

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Closed Captioning and Video Description )  
of Video Programming )

Implementation of Section 306 of the )  
Telecommunications Act of 1996 )

Video Programming Accessibility )

MM Docket No. 95-176

To: The Commission

**REPLY COMMENTS OF NEWHOUSE BROADCASTING CORPORATION d/b/a  
ADVANCE ENTERTAINMENT CORP.**

Newhouse Broadcasting Corporation d/b/a Advance Entertainment Corp. ("AEC"), by its attorneys, submits these Reply Comments in the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding.<sup>1/</sup> AEC is a passive carrier of television broadcast signals, engaged in the transmission of the broadcast signal of WSBK-TV, channel 38, Boston, Massachusetts, to multichannel video programming distributors ("MVPDs") nationwide.

Section 713 of the Telecommunications Act of 1996, Video Programming Accessibility,<sup>2/</sup> requires the Commission to prescribe rules and implementation schedules for captioning of video programming. In order to implement this provision, the Commission's NPRM describes and defines the closed captioning requirements, designates the entities

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<sup>1/</sup>FCC 97-4 (released January 17, 1997).

<sup>2/</sup>Telecommunications Act of 1996, Pub. L. 104-104, § 305(b), 110 Stat. 56 (1996).

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responsible for meeting these requirements, and proposes mechanisms for compliance with and the enforcement of the requirements. AEC supports the important goal of making video programming more accessible to persons with hearing disabilities and commends the efforts the Commission has made in this regard. AEC offers comment on the Commission's proposals regarding responsibility for compliance with the closed-captioning requirements.

The Commission proposes and seeks comment on the view that responsibility for compliance with the closed captioning requirements should be placed generally on video programming providers.<sup>3/</sup> Included in its definition of "video programming providers" are "all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities."<sup>4/</sup> The Commission further seeks comment on the assignment of responsibility for compliance when the signal of a broadcast station is retransmitted by an MVPD.<sup>5/</sup>

**I. BROADCASTERS, RATHER THAN MVPDS, SHOULD BE ASSIGNED CLOSED CAPTIONING RESPONSIBILITY WHEN PROGRAMMING IS SIMPLY RETRANSMITTED BY AN MVPD.**

AEC agrees with the Commission's proposal that in any case where an MVPD merely rebroadcasts the signal of a television broadcast station, the sole responsibility for closed captioning should rest with the broadcast station and not with the MVPD.<sup>6/</sup> This proposal received widespread support from parties filing initial comments in this proceeding. See,

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<sup>3/</sup>Id at ¶ 28.

<sup>4/</sup>Id.

<sup>5/</sup>Id at ¶ 44.

<sup>6/</sup>Id.

e.g., Comments of the National Cable Television Association at 35; Comments of United States Satellite Broadcasting Company, Inc. at 7-8; and Comments of Bell Atlantic at 6-8.

It seems self-evident that any closed captioning obligations adopted by the Commission will certainly apply to television broadcasters as "video programming providers." To the extent that an MVPD merely retransmits the entire signal of such television station, enabling all captioning information to flow through to the viewer, there is no basis to impose any further obligation on the MVPD with respect to such television broadcast programming. Similarly, if certain television broadcasters or certain types of television broadcast programming are exempted from captioning requirements, and thus could not be received in captioned format by viewers obtaining such signals off the air, there is no basis to require any MVPD rebroadcasting such programming to add any captioning not already provided by the broadcaster.

Forcing "host" MVPDs to undertake the expenditures and personnel necessary to effect closed captioning on the random chance that the transmitting station does not provide captioning for a particular program would be illogical and inefficient. Significantly, the FCC has already acknowledged the legitimacy and value of this position, "[W]e recognize that, from a practical standpoint, captioning at the production stage is often the most efficient manner to include closed captioning with video programming (footnote omitted)."<sup>2/</sup> MVPDs should not be burdened with the responsibility of meeting closed captioning requirements when they retransmit, without alteration, the programming of a television broadcast station.

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<sup>2/</sup>Id at ¶ 30.

## **II. PASSIVE CARRIERS ARE APPROPRIATELY EXCLUDED FROM COMPLIANCE WITH CLOSED CAPTIONING REQUIREMENTS.**

While AEC believes that all MVPDs should generally be exempt from any closed captioning obligation as to any broadcast television stations which they retransmit, the rationale for such an exemption is particularly compelling as to any passive carrier, such as AEC, which is statutorily precluded from altering the television broadcast signal which such carrier retransmits. Indeed, for passive carriers, like AEC, who merely act as a conduit for the retransmission of a broadcast signal and never directly reach individual homes, exemption from any closed captioning obligations is essential. The act of providing captioning would expose passive carriers to liability for copyright infringement.

Owners of copyrighted material can generally prevent the retransmission or "performance" of their material by withholding permission to retransmit the program.<sup>8/</sup> The retransmission of copyrighted programming without appropriate consent can create copyright infringement liability for the entity responsible for the transmission.<sup>9/</sup> As an exception to this general rule, passive carriers satisfying the criteria established in the Copyright Act are allowed to retransmit television broadcast stations, and are exempt from liability for copyright infringement liability, so long as such passive carriers do not direct, amend or control the content of the broadcast stations they transmit. Forcing such carriers to add or provide closed captions to the transmitted programming would automatically disqualify them from this very important exemption.

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<sup>8/</sup>17 U.S.C. § 101 *et seq.*

<sup>9/</sup>Id.

There are five discrete elements of the passive carrier exemption:

(1) the transmission must be a secondary transmission of a primary transmission embodying a performance or display of a work; (2) the transmission must be made by a carrier; (3) the carrier cannot have direct or indirect control over the content or selection of the primary transmission; (4) nor over the particular recipients of the secondary transmission; and (5) the carrier's activities with respect to the secondary transmission must consist solely of providing wires, cables or other communications channels for the use of others.<sup>10/</sup>

Imposition of the closed captioning requirements would eliminate the applicability of two of the foregoing requirements. The application of the closed caption text and codes to programming received from a broadcast station would be considered an exercise of "control over the content of a primary transmission."<sup>11/</sup> When the Court of Appeals found that a carrier did not commit copyright infringement by airing a baseball game which was within the stream of programming retransmitted from a television station, the court emphasized that "[t]o remain exempt, a carrier re-transmitter must avoid content control by retransmitting exactly what and all of what it receives. . . ."<sup>12/</sup>

Complying with the closed captioning requirements would also violate the last element of the exemption. The addition of closed captioning would mean that the passive carrier's transmission activities necessarily would exceed the mere provision of "wires, cables or other communications channels for the use of others." Closed captioning is typically encoded by a post-production company onto a master tape to be telecast, prepared and then transmitted

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<sup>10/</sup>17 U.S.C. § 111(a)(3).

<sup>11/</sup>See Eastern Microwave Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (1982).

<sup>12/</sup>Id. at 130.

with the program at the time it is aired or transcribed in real time as the program airs.<sup>13/</sup>

Clearly, the technology and personnel necessary to perform any of these techniques requires equipment and procedures that far exceed the limits allowed under the passive carrier exemption.

Additionally, the passive carrier copyright exemption is a significant benefit not only to passive carrier entities, but to the entire MVPD industry. Distribution of programming of distant broadcast stations, a service which is wholly dependent upon the activities of passive carriers like AEC, is a critical component of the MVPD industry. Without the programming of distant stations, MVPDs would lose access to valuable sports, news and entertainment programming which is accessible only through various distant broadcast signals. Relieving passive carriers from closed captioning responsibility is an important and necessary element of the Commission's closed captioning policy. AEC similarly urges the Commission not to hold MVPDs responsible for satisfying closed captioning requirements when the station's signal is merely retransmitted by the MVPD to consumer homes.

For all of the foregoing reasons, AEC encourages the Commission to adopt its proposed definition of video program providers which excludes passive carriers and,


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<sup>13/</sup>NPRM at ¶ 18-21.

appropriately, does not hold them responsible for compliance with the closed captioning requirements.

Respectfully submitted,

**NEWHOUSE BROADCASTING CORPORATION d/b/a  
ADVANCE ENTERTAINMENT CORP.**

  
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Dated: March 31, 1997      Its Attorneys